No. 82-1795

In the Supreme Court of the United States

OCTOBER TERM, 1983

CAPITAL CITIES CABLE, INC., ET AL., PETITIONERS

v.

RICHARD A. CRISP, DIRECTOR, OKLAHOMA ALCOHOLIC BEVERAGE CONTROL BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF THE FEDERAL COMMUNICATIONS COMMISSION AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the State's regulation of liquor advertising, as applied to out-of-state broadcast signals, is valid in light of existing federal regulation of cable broadcasting.

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INTEREST OF THE FEDERAL COMMUNICATIONS COMMISSION

Under the Communications Act of 1934, 47 U.S.C. (& Supp. V) 151 *et seq.*, the Federal Communications Commission has authority over all interstate and foreign communications by wire and radio—including cable television systems—for the purpose of making available "to all the people of the United States a rapid, efficient, Nationwide, and world-wide wire and radio communication service." 47 U.S.C. 151, 152(a). The Oklahoma law requiring state cable television systems to delete liquor advertisements from television signals that they carry has a significant impact on the regulatory scheme administered by the Commission. The advertising ban, if enforced, will prevent some cable system operators from complying with valid Commission regulations that,

among other things, specifically prohibit deletion of any part of a retransmitted broadcast signal, including commercials. The Oklahoma law, moreover, will hinder the provision of television service to rural and other areas of Oklahoma that receive all or most of their television service from cable retransmission of out-of-state television signals. The Oklahoma provision upheld by the court below thus undermines the longstanding federal policy of encouraging the widest availability and diversity in television.

This Court has directed the parties to brief and argue, in addition to other questions presented by the petitioners, the question: "Whether the state's regulation of liquor advertising, as applied to out-of-state broadcast signals, is valid in light of existing federal regulation of cable broadcasting." The Commission will limit its discussion as amicus curiae to this question.[1]

STATEMENT

The State of Oklahoma prohibits the advertising of alcoholic beverages, except by means of strictly regulated on-premises signs. Oklahoma Alcoholic Beverage Control Act, Okla. Stat. Ann. tit. 37, § 516 (West Cum. Supp. 1982); Okla. Const. Art. XXVII, § 5. This provision was originally adopted by public referendum, as part of a state constitutional amendment that replaced Oklahoma's prior ban on the sale and consumption of alcoholic beverages with a system of local option. For a number of years, the advertising ban has been enforced against television broadcast stations in Okla-

[1] To the extent necessary to address the effect of the Oklahoma provision on the regulatory framework of the cable industry as a whole, our discussion will encompass "cablecasting," *i.e.*, video programming not carried over television broadcast stations (see 47 C.F.R. 76.5(v)), as well as broadcasting. Cablecasting includes, for example, such satellite-delivered, national cable programming services as Home Box Office (HBO), Cable News Network (CNN), and USA Network. See *United States* v. *Midwest Video Corp.*, 406 U.S. 649, 651, 653 n.6 (1972).

homa that transmit national network programs containing wine advertisements.[2] Notwithstanding the apparent breadth of the advertising ban, the Oklahoma Attorney General has ruled that the law does not apply to out-of-state print media sold in Oklahoma, and until 1980 the law was not enforced against cable television systems retransmitting out-of-state broadcast signals (Pet. App. 4a, 5a n.1, 23a-24a). In March 1980, however, the State Attorney General issued an opinion in which he concluded that retransmission of wine commercials by cable television systems violates Oklahoma law.[3] Cable operators were therefore notified that they would be criminally prosecuted if such advertising were carried over their systems (Pet. App. 4a, 41a).

In March 1981, petitioners, several Oklahoma cable systems, filed suit in the United States District Court for the Western District of Oklahoma seeking declaratory and injunctive relief against Richard Crisp, Director of Oklahoma's Alcoholic Beverage Control Board. They argued that application of the advertising ban to cable carriage of out-of-state broadcast signals violated the Commerce and Supremacy Clauses, their free speech rights under the First and Fourteenth Amendments, and the Equal Protection Clause of the Fourteenth Amendment. On cross motions for summary judgment, the district court issued a permanent injunction barring enforcement of the Oklahoma law against petitioners. Applying the test set forth in *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, 447 U.S. 557 (1980),

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[2] The Oklahoma Supreme Court has found enforcement of the law against television stations to be consistent with the Commerce Clause of the United States Constitution. *Oklahoma Alcoholic Beverage Control Board* v. *Heublein Wines, Int'l*, 566 P.2d 1158 (Okla. 1977).

[3] Op. Okla. Att'y Gen. No. 79-334 (Mar. 19, 1980). Because beverages containing less than 3.2% alcohol may be advertised, and because beer may sometimes contain less than 3.2% alcohol, beer commercials need not be deleted (Pet. App. 3a). At the time this case was brought, hard liquor generally was not advertised on television.

the court held that the ban on liquor advertising was an unconstitutional restriction on the cable operators' First and Fourteenth Amendment right to engage in protected commercial speech. Pet. App. 33a-50a.[4] The court of appeals reversed, holding that, although the advertising at issue was protected by the First Amendment, the Oklahoma ban was a valid restriction on commercial speech (Pet. App. 20a, 24a).[5] The court recognized that its ruling placed cable broadcasters "in a difficult position"; however, the court did not address the preemptive effects of federal law on the Oklahoma advertising ban, noting only that "nothing in the First Amendment prohibits" the state proscription (*id.* at 23a).[6]

INTRODUCTION AND SUMMARY OF ARGUMENT

Oklahoma's prohibition of liquor advertisements, as applied to cable television transmissions, would have a serious adverse effect on the national system of cable television communications. Because federal copyright

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[4] The district court found that (1) cable systems import broadcast signals that originate outside Oklahoma and contain wine commercials; (2) federal law prohibits cable operators from modifying those signals; (3) cable operators "have no contractual relationship with the stations whose signals they carry, pay no fee to the stations for said signals, and have no voice in the programming carried by such stations"; (4) there is no feasible way for cable operators to delete advertising from imported signals; and (5) inability to carry out-of-state signals containing wine commercials "would probably cause a large but inherently immeasurable reduction in Plaintiffs' subscriber revenue" (Pet. App. 40a-42a).

[5] The court of appeals viewed this Court's summary dismissal of the appeal in *Queensgate Investment Co.* v. *Liquor Control Commission*, No. 81-2174 (Oct. 4, 1982), as controlling the result in the instant proceeding (Pet. App. 24a). In *Queensgate*, the Ohio Supreme Court upheld as consistent with the First and Fourteenth Amendments a partial ban on off-premises advertising of liquor prices by certain liquor permit holders. *Queensgate Investment Co.* v. *Liquor Control Commission*, 69 Ohio St. 2d 361, 433 N.E.2d 138 (1982).

[6] On April 4, 1983, the court of appeals stayed its mandate pending this Court's final disposition of the case (Pet. App. 27a).

law, FCC rules, and technical factors prohibit the deletion of advertisements from broadcast signals and other video programs transmitted by cable systems, Oklahoma's ban on liquor advertising will effectively prevent Oklahoma cable systems from retransmitting out-of-state programs to their subscribers. If allowed to stand, the court of appeals' decision will interfere with the FCC's regulatory authority, disrupt the nationwide cable television communications system, and diminish the diversity of broadcast voices available in Oklahoma, in direct contravention of federal statutory and regulatory policy.

I. Twenty-first Amendment considerations momentarily aside, Oklahoma's ban on liquor advertising is unquestionably preempted by federal law insofar as it is applied to transmission of out-of-state programming carried by Oklahoma cable television systems.

A. The federal intention to preempt state regulation of the content of cable advertising is explicit. The Commission has established a comprehensive and exclusive regulatory scheme, expressly preempting nonfederal restrictions on the "operational aspects" of cable television, including all "signal carriage regulation." *Clarification of Cable Television Rules*, 46 F.C.C.2d 175, 178 (1975); see *First Report and Order in Docket No. 18397*, 20 F.C.C. 2d 201, 223 (1969). The Commission's exclusive regulatory jurisdiction over program offerings comprises advertising as well as other programming (see *Second Report and Order in Docket No. 14895*, 2 F.C.C.2d 725, 756 (1966)), and nonbroadcast (or cablecast) programming as well as broadcast-originated signals. See *Clarification of CATV First Report as to Scope of Federal Preemption*, 20 F.C.C.2d 741 (1969); *Time-Life Broadcast, Inc.*, 31 F.C.C. 2d 747 (1971).

B. The Oklahoma provision directly conflicts with the specific regulatory scheme erected by Congress and the Commission. Compliance with Oklahoma's ban on wine commercials would make it impossible for cable operators to comply with the nondeletion requirements of the

Copyright Act and of federal regulations, as well as with the Commission's rules requiring the carriage of signals from nearby local broadcast stations. Moreover, compliance would be technically impracticable given the structure of the industry as it has developed under federal regulation.

C. The Oklahoma provision, if enforced, would significantly interfere with achievement of the purposes and objectives of national cable communications policy, as established by Congress and the Commission. It would significantly diminish the access of Oklahoma residents to the broad range of programming intended to be available on a nationwide basis.

II. The regulations that produce this preemptive effect on Oklahoma's prohibition of liquor advertising as it applies to cable television are a valid exercise of the broad authority delegated to the Commission under the Communications Act of 1934. As such, they must prevail over conflicting state laws.

III. The Twenty-first Amendment's grant of enhanced authority to the states over the sale and importation of alcoholic beverages does not alter this conclusion. The Twenty-first Amendment does not displace all federal law that has an effect on the sale of liquor. Here, the State's liquor regulation has a direct, significant, and adverse effect on the cable television industry—an unrelated industry which it is the policy of Congress to foster and encourage.

ARGUMENT

I. REGULATION OF OUT-OF-STATE ADVERTISING TRANSMITTED OVER CABLE TELEVISION IS PREEMPTED BY FEDERAL LAW

The preemption of state laws, especially those touching on the area of heightened state authority under the Twenty-first Amendment, is not lightly inferred. In this case, however, the State of Oklahoma has purported to require operators of cable television systems to do what

they cannot and may not do under the federal regulatory scheme. In light of the Commission's unambiguous intent to preempt such state laws, the inconsistency between the Oklahoma law and the federal scheme, and the severe adverse consequences to the nation's system of cable communications, the Oklahoma provision at issue cannot stand. Cf. *Head* v. *New Mexico Board of Examiners in Optometry*, 374 U.S. 424 (1963).[7]

A. The Commission has expressly preempted this form of state regulation

"It is well established that within constitutional limits Congress may preempt state authority by so stating in

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[7] In *Head*, this Court concluded that FCC radio broadcasting regulations did not preempt the state's authority to ban price-related eyeglass advertising. As we demonstrate below, the state and federal laws at issue here are in every material respect distinguishable from those in *Head*: the Commission's preemptive intent is explicit and unambiguous; the conflict between state and federal law is irreconcilable; and the state law, if enforced, would seriously interfere with achievement of federal policy. The differences between broadcast and cable regulation, reflected in *Head* and the instant case, arise from differences in the technical structure and economic role of the broadcast and cable industries. Generally speaking, cable operators, unlike broadcasters, retransmit programming verbatim from a wide variety of sources simultaneously. Cable operators typically have no means for deleting specified types of commercial advertising, and were they to do so, it would injure the economic interests of program originators protected under copyright law, FCC rule, and contract. These distinctions between broadcast and cable remain at the heart of FCC regulatory policy. See 48 Fed. Reg. 49855 (1983) (suggesting that local laws prohibiting alcoholic beverage advertising over radio may be enforced by local authorities). The Oklahoma Attorney General, however, failed to recognize any legally relevant differences between these media:

> There is no reason to believe that cable television should be treated any differently than regularly broadcast television. Furthermore, distinctions between cable television and regularly broadcast television if any, are issues of fact not properly addressed by an Attorney General's Opinion.

Op. Okla. Att'y Gen. No. 79-334, at 3.

express terms." *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation and Development Comm'n*, No. 81-1954 (Apr. 20, 1983), slip op. 11. See *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977). As in *Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 154 (1982), the federal "intent to preempt" state regulation of the content of cable advertising "is unambiguous." The Commission has adopted a regulatory system for cable television of "deliberately structured dualism" (*Cable Television Report and Order in Docket No. 18397*, 36 F.C.C.2d 143, 207, on reconsideration, 36 F.C.C.2d 326 (1972), aff'd *sub nom. American Civil Liberties Union* v. *FCC*, 523 F.2d 1344 (9th Cir. 1975)), permitting state authorities to regulate the narrowly-defined local incidents of cable television, while preempting all nonfederal regulation of other matters. See *Report and Order in Docket No. 20272*, 54 F.C.C.2d 855, 861 (1975). "The ultimate dividing line," the Commission has determined, "rests on the distinction between reasonable regulations regarding use of the streets and right-of-way and the regulation of the operational aspects of cable communications" (*ibid.*). The "operational aspects of cable communications"—explicitly preempted—include "signal carriage, pay cable, leased channel regulations, technical standards, * * * and several aspects of franchise responsibility" (*id.* at 863). The state and local role in this scheme involves "the non-operational aspects of cable franchising including bonding agreements, maintenance of rights-of-ways, franchisee selection and conditions of occupancy and construction" (*ibid.*).[8]

The Commission has left no doubt that its assertion of exclusive federal regulatory authority over the "operational aspects" of cable television precludes any state regulation of carriage of television broadcast signals:

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[8] The Commission has allowed state and local franchising authorities to impose certain additional "affirmative obligations," not inconsistent with federal regulatory policies, now including, for example, requirements for public access channels. See *First Report and Order in Docket No. 18397*, 20 F.C.C. 2d at 223 n.28.

"The fact that this Commission has pre-empted jurisdiction of any and all signal carriage regulation is unquestioned. * * * Franchising authorities do not have any jurisdiction or authority relating to signal carriage." *Clarification of Cable Television Rules*, 46 F.C.C.2d at 178.[9] The Commission's exclusive regulatory jurisdiction over program offerings extends to advertising as well as other programming (see *Second Report and Order in Docket No. 14895*, 2 F.C.C.2d at 756), and to nonbroadcast (or cablecast) as well as retransmitted broadcast programming. *Community Cable TV, Inc.*, No. 83-525 (FCC Nov. 15, 1983), slip op. 13; *Clarification of CATV First Report as to Scope of Federal Preemption*, 20 F.C.C.2d 741 (1969); *Time-Life Broadcast, Inc.*, 31 F.C.C.2d 747 (1971). The Commission has accordingly preempted regulation of the "rates, terms and conditions" of video program services provided by cable systems, including origination programming,[10] pay programming,[11] and other video auxiliary services.[12] The

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[9] The Commission has chosen not to exercise control over the programming decisions of cable operators, preferring "to afford a period of free experimentation and innovation." *First Report and Order in Docket No. 18397*, 20 F.C.C.2d at 214; see *Brookhaven Cable TV, Inc.* v. *Kelly*, 573 F.2d 765 (2d Cir. 1978), cert. denied, 441 U.S. 904 (1979). However, the conflict between state and federal law does not "evaporate" merely because federal law is permissive in nature. *Fidelity Federal Savings & Loan Ass'n*, 458 U.S. at 155. Just as the Federal Home Loan Bank Board in *Fidelity Federal* explicitly preempted state due-on-sale clauses in order to protect the flexibility and discretion of federal savings and loan institutions (*ibid.*), here the Commission has explicitly preempted nonfederal regulation of operational aspects of cable systems in order to promote, inter alia, innovation and experimentation. *First Report and Order in Docket No. 18397*, 20 F.C.C.2d at 214, 223.

[10] See *Time-Life Broadcast, Inc.*, 31 F.C.C.2d 747 (1971).

[11] See *Clarification of Cable Television Rules*, 46 F.C.C.2d at 199-200; *Report and Order in Docket No. 20272*, 54 F.C.C.2d at 861-863; *Notice of Inquiry in Docket No. 20767*, 58 F.C.C.2d 915, 915-916 (1976); *Brookhaven Cable TV, Inc.* v. *Kelly*, 573 F.2d 765 (2d. Cir. 1978), cert. denied, 441 U.S. 904 (1979).

[12] *Community Cable TV, Inc.*, No. 83-525 (FCC Nov. 15, 1983).

purpose of its regulatory scheme, the Commission has declared, is to ensure "that the benefits of cable communications become a reality on a nationwide basis." *Report and Order in Docket No. 20272*, 54 F.C.C.2d at 865.

The Oklahoma advertising ban plainly exceeds the regulatory authority reserved to the states under this system, and invades the exclusive jurisdiction of the Commission over operational aspects of cable television.[13] Oklahoma retains authority over franchise selection, rights of way, conditions of occupancy or construction, financial responsibility, and the like; but the State may not "interfer[e] with federally authorized CATV origination and advertising." *Time-Life Broadcast, Inc.*, 31 F.C.C.2d at 747.

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[13] In a recent Memorandum Opinion and Order addressing the preemptive effect of federal cable regulation, the Commission reiterated its understanding of preemption in precisely the circumstances of this case:

> While this proceeding is directed primarily to issues involving state or local rate controls, we remain concerned with other types of regulations that may impede new cable services and burden interstate communications. State controls over advertising on cable channels distributed by space satellite may both undercut the economic base for such services and render their operation on an interstate basis a practical impossibility. We have in the past stated that local franchise provisions or regulations that prohibit advertising in a manner consistent with our rules are preempted. *Federal Preemption of CATV Regulations*, [20 F.C.C.2d 741 (1969)]. The types of regulation promulgated by the state of Oklahoma in *Oklahoma Telecasters Ass'n* v. *Crisp*, 699 F.2d 490 (10th Cir. 1983), *petition for cert. filed sub. nom Capital Cities Cable, Inc.* v. *Crisp*, No. 82-1795, would thus undermine the goals of preemption articulated by the Commission in this and earlier cases.

Community Cable TV, Inc., No. 83-525 (FCC Nov. 15, 1983), slip op. 14 n.26. A copy of this Memorandum Opinion and Order has been lodged with the Clerk of this Court. As shown in text, this is merely a restatement of longstanding FCC policy. Cf. *Fidelity Federal Savings & Loan Ass'n*, 458 U.S. at 155.

That the preemption of Oklahoma's ban on liquor advertising over cable television derives from the regulatory policy of the Commission rather than directly from an Act of Congress does not affect this conclusion. As this Court stated in *Fidelity Federal Savings & Loan Ass'n*, 458 U.S. at 153-154:

> Federal regulations have no less pre-emptive effect than federal statutes. Where Congress has directed an administrator to exercise his discretion, his judgments are subject to judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily.

See also *Blum* v. *Bacon*, 457 U.S. 132 (1982); *Free* v. *Bland*, 369 U.S. 663, 668 (1962); *United States* v. *Shimer*, 367 U.S. 374, 381-382 (1961).

B. The Oklahoma ban on liquor advertising directly conflicts with federal regulations

Even aside from general federal preclusion of state regulation of the operational aspects of cable television, the Oklahoma ban on liquor advertising conflicts with specific regulatory rules and policies of Congress and the Commission.

First, Oklahoma's ban on liquor advertising, as it applies to cable retransmission of broadcast signals, directly conflicts with nondeletion requirements of the Copyright Act of 1976, 17 U.S.C. 111(c),[14] and similar FCC regulations. The Copyright Act establishes a compulsory licensing system for the carriage of television broadcast signals by cable systems. Section 111(c)(3) of the Copyright Act, 17 U.S.C. 111(c)(3), requires cable systems, in order to avail themselves of the benefits of

[14] This Court held in *Goldstein* v. *California*, 412 U.S. 546, 556-560 (1973), that although states had not relinquished exclusive power to the federal government to grant copyright protection, where state and federal laws were in conflict, the federal law would prevail.

the statutory scheme,[15] to carry broadcast signals intact, without deleting any material, including advertisements.[16] This requirement is designed to protect the advertiser, and thus the copyright holder, since the latter's compensation "is directly related to the size of the audience that the advertiser's message is calculated to reach." H.R. Rep. 94-1476, 94th Cong., 2d Sess. 94 (1976). The statute also protects broadcasters by preventing a cable system from inserting advertising without having to bear the same program costs that broadcasters must bear (*ibid.*).

A similar prohibition against the deletion of advertisements from retransmitted signals is contained in the Commission's rules (47 C.F.R. 76.55(b)):

> Where a television broadcast signal is carried by a community unit, pursuant to the rules in this subpart, the programs broadcast shall be carried in full, without deletion or alteration of any portion except as required by this part.

This nondeletion principle applies to commercial advertisements as well as regular programming. See *Garland B. Pugh*, 68 F.C.C.2d 997, 999 (1978); *WAPA-TV Broadcasting Corp.*, 59 F.C.C.2d 263, 272 (1976); *Notice of Proposed Rulemaking and Notice of Inquiry in Docket No. 18397*, 15 F.C.C.2d 417, 444 (1968); *Second Report*

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[15] Cable operators are permitted under the Copyright Act's "compulsory license" scheme to retransmit any broadcast signal without making individual arrangements with the broadcast licensee. Instead, cable systems make payments to a royalty pool which is then divided among broadcasters. 17 U.S.C. 111(d). The compulsory license system was created in order to enable cable systems to carry *signals without having to negotiate* with every copyright owner whose work the cable operator retransmitted. Congress considered such individual negotiations unfeasible. H.R. Rep. 94-1476, 94th Cong., 2d Sess. 89 (1976).

[16] The Act contains a minor exception, not applicable here, for "those engaged in television commercial advertising market research." 17 U.S.C. 111(c)(3).

and Order in Docket No. 14895, 2 F.C.C.2d at 753, 756. The policy "is designed to prevent a loss of revenues to local broadcasters sufficient to result in reduced service to the public." *Garland B. Pugh*, 68 F.C.C.2d at 999.[17]

The Oklahoma provision at issue directly conflicts with these prohibitions. Indeed, the deletion of advertisements is precisely the practice the federal rules are directed against. The economics of programming and broadcasting are such that to permit cable operators to delete advertising would disrupt the system of payments and incentives needed to stimulate the business and reward production. That the purpose of Oklahoma's liquor advertising ban is not to interfere with the federal scheme is immaterial (*Perez* v. *Campbell*, 402 U.S. 637, 651 (1971)); the effect (to the extent that compliance is even technologically feasible)[18] is to allow—indeed, to compel—Oklahoma cable operators to receive the benefits of nationwide programming without carrying a portion of the advertising that pays for it. Since compliance with both federal and state law is a legal impossibility the state law must yield. *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-143 (1963); *Farmers Union* v. *WDAY, Inc.*, 360 U.S. 525, 531-535 (1959).

Second, the advertising ban conflicts with the Commission's so-called "must carry" rules. In order to protect local television programming and broadcasting, the Commission adopted rules in 1965 requiring certain cable systems to carry all television signals that were available over the air in their service area (the "must carry" rules), and to delete certain imported programming that

[17] Although a specific rule of this sort was first adopted in 1972 (*Cable Television Report and Order in Docket No. 18397*, 36 F.C.C.2d at 230), the Commission had indicated as early as 1966 that its signal carriage requirements embraced an implicit prohibition against any deletion or alteration of any portion (including advertising) of signals carried. See *Second Report and Order in Docket No. 14895*, 2 F.C.C.2d at 756.

[18] See pages 16-17, *infra*.

duplicated local programs (the "nonduplication" rules).[19] *First Report and Order in Docket No. 14895*, 38 F.C.C. 683 (1965), aff'd *sub nom. Black Hills Video Corp.* v. *FCC*, 399 F.2d 65 (8th Cir. 1968). In 1966 the Commission extended these rules to all cable systems and also imposed substantial restrictions on the importation of distant television signals by cable systems (the "distant signal" rules). *Second Report and Order in Docket No. 14895*, 2 F.C.C.2d at 725. These rules were designed to ensure that cable subscribers would continue to receive all available local signals, that the relative competitive positions of the stations in the area would be preserved, and that the system of local broadcasting created by the Commission under Section 307(b) of the Communications Act would not be jeopardized by competition from cable systems. *Second Report and Order in Docket No. 14895*, 2 F.C.C.2d at 735-736.[20]

In 1972 the Commission promulgated a comprehensive scheme of regulation for cable television systems that included, in addition to other regulations, "must carry," "distant signal" and "nonduplication" rules of the type described above. *Cable Television Report and Order in Docket No. 18397*, 36 F.C.C.2d 143, on reconsideration, 36 F.C.C.2d 326 (1972), aff'd *sub nom. American Civil Liberties Union* v. *FCC*, 523 F.2d 1344 (9th Cir. 1975). It was as part of this scheme that the Commission

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[19] The nonduplication rules evolved into two different sets of rules, one dealing with network programs and the other with nonnetwork programs. The latter rules were referred to as the "syndicated program exclusivity" rules. See, *e.g.*, *Cable Television Report and Order in Docket No. 18397*, 36 F.C.C.2d at 181-185.

[20] See *Cable Television Report and Order in Docket No. 18397*, 36 F.C.C.2d 143, 164, 165, on reconsideration, 36 F.C.C.2d 326 (1972), aff'd *sub nom. American Civil Liberties Union* v. *FCC*, 523 F.2d 1344 (9th Cir. 1975); *Second Report and Order in Docket No. 14895*, 2 F.C.C.2d 725, 781 (1966), aff'd *sub nom. Black Hills Video Corp.* v. *FCC*, 339 F.2d 65 (8th Cir. 1968); *First Report and Order in Docket No. 14895*, 38 F.C.C.2d 683, 700, 713 (1965). See also *Arlington Telecommunications Corp.*, 70 F.C.C.2d 2291, 2298-2299 (1979).

adopted the "deliberately structured dualism" (see page 8, *supra*) that permits state authorities to regulate the local incidents of cable television service while preempting regulation of operational aspects of cable systems. See *Cable Television Report and Order in Docket No. 18397*, 36 F.C.C.2d at 207.

The "must carry" rules are still in effect today, although in somewhat modified form. See 47 C.F.R. 76.51-76.61 (1980).[21] Under these rules, certain cable operators are required to carry the signals of particular television broadcast stations. In particular, cable operators may be required to carry the signals of a broadcast station within a "specified zone" (35 miles) or if the station is "significantly viewed" in the community served by the cable operator. 47 C.F.R. 76.59(a)(1), (5) and (6). The "must carry" rules often require the cable operator to carry signals from a broadcast station in a nearby state. J.A. 22, 35; II R. 34-35, 52-53. Under 47 C.F.R. 76.55(b),[22] the signals must, moreover, be carried with no modifications or deletions, even of commercials.

Oklahoma's ban on liquor advertising over cable directly conflicts with these rules. The Commission staff estimates that approximately one-third of the land area of Oklahoma now receives out-of-state television broadcast signals that are required to be carried under the "must carry" rules. See Television Digest, Inc., *Television & Cable Factbook* 699-717 (1982-1983 ed.). Cable operators required to carry out-of-state signals that include liquor advertisements would face criminal prosecution under state law as a result of compliance with federal require-

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[21] The "distant signal" and "syndicated exclusivity" rules have been rescinded, on a finding that they were no longer necessary to protect the viability of local broadcasting and had come to restrict competition and diversity in programming. *Cable Television Syndicated Program Exclusivity Rules*, 79 F.C.C.2d 663, 813-814 (1980), aff'd *sub nom. Malrite T.V. v. FCC*, 652 F.2d 1140 (2d Cir. 1981), cert. denied, 454 U.S. 1143 (1982). Network nonduplication rules, like "must carry" rules, remain in effect. 47 C.F.R. 76.92-76.99.

[22] Discussed at pages 12-13, *supra*.

ments. This is a textbook case of conflict, compelling a finding of federal preemption. *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. at 142-143; *Farmers Union* v. *WDAY, Inc.*, 360 U.S. at 531-535.

Finally, even for non-broadcast (or cablecast) programming (to which the "must carry" rules, the Copyright Act nondeletion requirements, and the FCC nondeletion requirements do not apply), compliance with the Oklahoma ban on wine commercials as well as federal regulations may well be "'a physical impossibility.'" *Pacific Gas & Electric Co.*, slip op. 11 (quoting *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. at 142-143). Not all cablecasted programming contains advertising—HBO is a well-known example that does not—but it is more common for it to do so. See J.A. 25; II R. 39. Among the advertisements carried are wine commercials (*ibid.*). The Oklahoma advertising ban thus creates a technical difficulty for cablecasting. The district court made a factual finding that "[t]here exists no feasible way for [cable operators] to block out the advertisements" (Pet. App. 41a). See also J.A. 24, 26, 29, 39; II R. 37-38, 40-41, 44, 58.

Unlike television broadcast stations, which are required by FCC regulations to have operators supervise their transmissions (see 47 C.F.R. 73.1860), cable television systems face no such requirement and are often fully automated with no regular operator on duty. Moreover, while a broadcast station transmits only a single signal, a cable system normally transmits a minimum of 12 signals, and often more than 30, simultaneously. Constant monitoring of all of these signals to delete wine commercials as required by the Oklahoma law, even where such deletion is permissible, would be a prohibitively burdensome task. The Congress reached a similar conclusion in adopting the Copyright Act of 1976. A major reason why Congress concluded that imposing full copyright liability on cable systems would be unworkable was that the technical and logistical problems of interposing the necessary personnel and equipment to

block out programs as to which the cable operator had not obtained copyright permission would be insurmountable. See, *e.g.*, *Copyright Law Revisions: Hearings on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 94th Cong., 1st Sess., Pt. 1, at 758 (1975); *Copyright Law Revisions: Hearings on S. 1361 Before the Subcomm. on Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 291-292, 400-401 (1973); *Copyright Law Revisions: Hearings on H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835, Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 89th Cong., 1st Sess., Pts. 1 & 3, at 36, 1251-1254 (1965).[23]

The Oklahoma provision thus cannot be harmonized with our national cable communications system. Given the structure of the industry, as developed in response to FCC and statutory policies precluding selective deletion of broadcast signals, cable operators are not now able to comply with state laws based on an entirely different premise.

C. The Oklahoma ban on liquor advertising stands as an obstacle to the achievement of the Commission's full purposes and objectives

This Court has frequently reiterated that state law is preempted if it " 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Pacific Gas & Electric Co.*, slip op. 11 (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)); *Fidelity Federal Savings & Loan Ass'n*, 458 U.S. at 153; *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. at 142-143. And, as noted at page 11, *supra*, the preemp-

[23] See also *Cable Television Report and Order in Docket No. 18397*, 36 F.C.C.2d at 165, in which the Commission rejected as technically unfeasible a proposal to allow commercial substitution by cable operators. It is also significant that many cable-originated program distributors, such as CNN, contractually forbid deletion of advertising.

tion doctrine applies to valid federal regulations no less than to Acts of Congress.

In accordance with the broad authorities and policies of the Communications Act of 1934, the Commission has fostered a nationwide system of over-the-air and cable television communications designed to expand the range of voices and programming available to viewers in all parts of the country.[24] The regulatory scheme is intended not merely to protect—but actively to promote—this objective. See *United States* v. *Midwest Video Corp.*, 406 U.S. at 667. "[I]t has long been a basic tenet of national communications policy that 'the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.'" *First Report and Order in Docket No. 18397*, 20 F.C.C.2d at 205 (quoting *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945)). See also *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 796-798 (1978). Cable is particularly important as a means of providing television service "in areas too small in population to support a local station or too remote in distance or isolated by terrain to receive regular or good off-the-air reception." *Second Report and Order in Docket No. 14895*, 2 F.C.C.2d 725, 781 (1966), aff'd *sub nom. Black Hills Video Corp.* v. *FCC*, 399 F.2d 65 (8th Cir. 1968). As the record in this case indicates, in many towns of Oklahoma the only available television signals

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[24] The Commission's pursuit of a strong and diverse cable television communications system is grounded in First Amendment, as well as statutory, concerns. See *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 122 (1973). The Commission has regulated cable television signal carriage only where such regulation is believed to be necessary to protect local television service, and even then has fashioned its rules in such a way as to impose "the least possible restrictions on First Amendment freedoms." *Tulsa Cable Television*, 74 F.C.C.2d 382, 385 (1979) (citing *United States* v. *O'Brien*, 391 U.S. 367 (1968)); *Arlington Telecommunications Corp.*, 70 F.C.C.2d 2291, 2299-2300 (1979).

are those of out-of-state stations imported by cable systems. J.A. 37; II R. 55-56.

The Oklahoma provision at issue affects not only the advertising of alcoholic beverages; it also has the effect of banning the carriage of many out-of-state broadcast and cablecast programs by Oklahoma cable operators.[25] Oklahoma cable subscribers will be deprived, for example, of the programming of distant out-of-state stations, including cable "superstations" whose programming has wide national appeal. Further, because carriage of out-of-state broadcast signals is what attracts many subscribers to cable, cable systems are likely to lose much of their appeal, and therefore substantial revenues, as a result of the ban, as the district court found (Pet. App. 42a).[26] If cable systems cease operations or are required to restrict severely the programming that they carry, the public will be denied access not just to retransmitted television broadcast signals, but also to other cable services, including specialty news, public affairs, motion pictures, and sports cable channels. The Oklahoma ban against wine commercials, therefore, threatens a substantial decrease in program availability and diversity for residents of Oklahoma, thus thwarting the national policy favoring the dissemination of information from varied and diverse sources "to all the people of the United States" (47 U.S.C. 151).

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[25] If the Oklahoma advertising ban is enforced, cable operators in that state will be unable to satisfy the requirements for obtaining the compulsory license provided under the Copyright Act. This problem alone would be devastating to their programming because it would require them to undertake the protracted royalty negotiations found infeasible by Congress. H.R. Rep. 94-1476, *supra*, at 89.

[26] See *Malrite T.V.* v. *FCC*, 652 F.2d 1140, 1145 n.4 (2d Cir. 1981). Cf. *Fidelity Federal Savings & Loan Ass'n*, 458 U.S. at 156 ("By further limiting the availability of an option the Board considers essential to the economic soundness of the thrift industry, the State has created 'an obstacle to the accomplishment and execution of the full purposes and objectives' of the due-on-sale regulation. *Hines* v. *Davidowitz*, 312 U.S., at 67.").

II. THE FCC REGULATIONS THAT PREEMPT THE OKLAHOMA PROVISION ARE VALID AND AUTHORIZED BY STATUTE

This Court held in *Fidelity Federal* that when an agency adopts regulations intended to preempt state law, the court's inquiry becomes whether the policy " 'represents a reasonable accommodation of conflicting policies' " and "is within the scope of the [agency's] delegated authority." 458 U.S. at 154 (quoting *United States* v. *Shimer*, 367 U.S. at 383). The FCC rules at issue here easily satisfy that test.

The Commission has been entrusted with "broad authority" over cable television, deriving from Section 2(a) of the Communications Act of 1934, 47 U.S.C. 152(a).[27] *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 178 (1968). The Act has been held to provide a " 'comprehensive mandate', with 'not niggardly but expansive powers' " (*id.* at 173, quoting *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 219 (1943)). This statutory delegation of authority provides a sufficient basis for regulatory action that is "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting" (392 U.S. at 178). The authority is exercised both to protect the "system of local television broadcasting" (*id.* at 177), and to "promote the objectives for which the Commission had been assigned jurisdiction over broadcasting." *United States* v. *Midwest Video Corp.*, 406 U.S. at 667 (plurality opinion). The breadth of the Commission's ancillary powers over cable television was confirmed in *Midwest Video Corp.*, which made clear that the Commission's authority encompassed cable retrans-

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[27] This section provides in relevant part: "The provisions of this [Act] shall apply to all interstate and foreign communication by wire or radio." 47 U.S.C. 152(a). The Communications Act has been held to apply to cable television, even though that technology did not exist at the time of passage of the Act. *United States* v. *Southwestern Cable*, 392 U.S. 157, 167-169 (1968).

mission of television broadcast signals as well as cablecasting (406 U.S. at 653 n.6, 662-663).

The Commission's regulation of cable programming and preemption of conflicting state regulation are designed to serve precisely those objectives identified by this Court in *Southwestern Cable Co.* and *Midwest Video Corp.* as warranting federal regulation of the cable industry. The Commission's initial objective in regulating signal carriage by cable systems was to ensure that the development of cable television would not disrupt the Commission's national television allocation policies. This was plainly within the Commission's authority to take regulatory action that is "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." *Southwestern Cable Co.*, 392 U.S. at 178. The Commission's regulation of cable programming is also designed to serve the objective of increasing program availability and diversity. See *Midwest Video Corp.*, 406 U.S. at 662-670.

Moreover, the Commission's decision to preempt nonfederal regulation of cable programming was a reasonable exercise of the Commission's jurisdiction. The Commission has concluded that its regulation of cable systems is essential "to promote national communications objectives" and that its rules are intended to "assur[e] that the benefits of cable communications become a reality on a nationwide basis." *Report and Order in Docket No. 20272*, 54 F.C.C. 2d at 864-865. Federal preemption is required to enable the cable television industry to develop its "vast potential" (*id.* at 865) free from state or local regulation that might inhibit diversity of offerings or weaken the economic base of the industry. While some may disagree with the Commission's judgment that "the public interest would best be served for the present by encouraging [cable television] to experiment and develop its originations free from * * * limitations as to types of programming" (*First Report and Order in Docket No. 18397*, 20 F.C.C.2d at 205), that judgment is plainly within the scope of the Commission's charter to promote

a "rapid, efficient, Nationwide and world-wide wire and radio communications service." 47 U.S.C. 151. When a federal agency has adopted reasonable regulations within its authority, as the Commission has done here, a conflicting state law such as Oklahoma's must yield. *Fidelity Federal Savings & Loan Ass'n*, 458 U.S. at 153-154; *Free* v. *Bland*, 369 U.S. 663, 666 (1962).

III. THE AUTHORITY GRANTED THE STATES BY THE TWENTY-FIRST AMENDMENT TO REGULATE THE IMPORTATION OF ALCOHOLIC BEVERAGES DOES NOT VALIDATE OKLAHOMA'S ADVERTISING BAN

As set forth above, the application of Oklahoma's advertising ban to cable broadcasters is preempted by valid federal regulations designed to foster the nation's cable communications system. The state's authority under the Twenty-first Amendment to control the "transportation or importation" of intoxicating liquors does not alter this result.[28]

The states admittedly have broad power under the Twenty-first Amendment to regulate commerce in intoxicating liquors within their borders. See *State Board of Education* v. *Young's Market Co.*, 299 U.S. 59, 64 (1936). But the "added presumption in favor of the validity of the state regulation in this area" (*California* v. *LaRue*, 409 U.S. 109, 118 (1972)) is not without limits. The Amendment did not pro tanto repeal the Constitution with respect to state liquor regulation, but rather "primarily created an exception to the normal operation of the Commerce Clause." *Craig* v. *Boren*, 429

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[28] Section 2 of the Twenty-first Amendment provides:

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

U.S. 190, 206 (1976). See, *e.g.*, *Hostetter* v. *Idlewild Liquor Corp.*, 377 U.S. 324, 330 (1964); *Carter* v. *Virginia*, 321 U.S. 131, 139-140 (1944) (Frankfurter, J., concurring); *Joseph S. Finch & Co.* v. *McKittrick*, 305 U.S. 395, 398 (1939).[29]

Even as to the Commerce Clause, the Amendment does not preclude all federal regulation. *Hostetter* v. *Idlewild Liquor Corp., supra*; *Nippert* v. *City of Richmond*, 327 U.S. 416, 425 n.15 (1946); *William Jameson & Co.* v. *Morgenthau*, 307 U.S. 171 (1939) (per curiam). As this Court has explained, "the Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system. Although States retain substantial discretion to establish other liquor regulations, those controls may be subject to the federal commerce power in appropriate situations." *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980).

In analyzing the impact of the Twenty-first Amendment on state regulations, therefore, this Court has distinguished between the scope of a state's authority to act under the so-called "dormant" or "negative" Commerce Clause (*e.g.*, *Joseph E. Seagram & Sons, Inc.* v. *Hostetter*, 384 U.S. 35, 41-45 (1966); *State Board of Education* v. *Young's Market Co., supra*), and the resolution of conflicts under the Supremacy Clause (*California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc., supra*). The Court has recognized that the states have wide lati-

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[29] The Court has concluded that a "State may not exercise its power under the 21st Amendment in a way which impinges upon the Establishment Clause of the First Amendment" (*Larkin* v. *Grendel's Den, Inc.*, No. 81-878 (Dec. 13, 1982), slip op. 6 n.5), nor does the Amendment permit a state to "alter the application of equal protection standards that otherwise govern" (*Craig* v. *Boren*, 429 U.S. at 209-210) or dilute the due process requirements of the Fourteenth Amendment (*Wisconsin* v. *Constantineau*, 400 U.S. 433, 436 (1971)). See also *Department of Revenue* v. *James Beam Distilling Co.*, 377 U.S. 341 (1964) (state may not tax imported liquor in violation of the Export-Import Clause).

tude to regulate the distribution of alcoholic beverages within their borders, virtually unrestrained by the "dormant" Commerce Clause; however, the Court has yet to sustain a state regulation under the Twenty-first Amendment in the face of an actual conflicting federal law otherwise entitled to preemptive effect under the Supremacy Clause. See *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc., supra*; *Collins* v. *Yosemite Park & Curry Co.*, 304 U.S. 518 (1938); cf. *Joseph E. Seagram & Sons, Inc.* v. *Hostetter*, 384 U.S. at 45 (finding "no such clear conflict" between state and federal laws).

Here, there is unquestionably a conflict between state and federal law. Accordingly, resolution of this case entails a "pragmatic effort to harmonize state and federal powers." *California Retail Liquor Dealers Ass'n*, 445 U.S. at 109. However, the analysis need not necessarily reduce to an ad hoc comparison of the interests to be served by the conflicting federal and state laws. Section 2 of the Twenty-first Amendment has one narrow though important purpose: it was "designed *only* to augment the powers of the States to regulate the importation of liquor destined for use, distribution, or consumption in its own territory." *United States* v. *State Tax Commission*, 412 U.S. 363, 378 (1973) (emphasis added) (citing *Collins* v. *Yosemite Park & Curry Co.*, 304 U.S. at 538); see *United States* v. *Frankfort Distilleries, Inc.*, 324 U.S. 293, 299 (1945).[30]

This purpose suggests both geographical and substantive limitations on the Twenty-first Amendment powers of the states vis-a-vis otherwise preemptive federal laws.

[30] "In determining state powers under the Twenty-first Amendment, the Court has focused primarily on the language of the provision rather than the history behind it. In terms, the Amendment gives the States control over the 'transportation or importation' of liquor into their territories." *California Retail Liquor Dealers Ass'n*, 445 U.S. at 106-107 (citation omitted; footnote omitted).

This Court has recognized that the states have no enhanced authority under the Twenty-first Amendment to regulate the importation or transportation of alcoholic beverages outside their boundaries—in sister states or federal enclaves. *State Tax Commission*, 412 U.S. at 378. We urge the Court to recognize a parallel limitation with respect to the nature of the industries or transactions that are the subject of the federal-state conflict. We submit that there should be a strong presumption in favor of enforcing federal provisions that govern the conduct of parties not directly involved in the distribution of alcoholic beverages. State authority over "how to structure the liquor distribution system" (*California Retail Liquor Dealers Ass'n*, 445 U.S. at 110) should not " 'increase [the states'] jurisdiction' " (*State Tax Commission*, 412 U.S. at 378 (citation omitted)) over other activities in interstate commerce—especially not over entities lacking any economic interest in or contractual relationship with the business of liquor distribution. A state may not prohibit importation of pretzels merely because they whet the appetite for beer.

We do not dispute that, pursuant to its authority under the Twenty-first Amendment, a state may impose reasonable restraints on advertising by those who sell liquor, such as liquor permit holders. See *Queensgate Investment Co.* v. *Liquor Control Commission*, No. 81-2174 (Oct. 4, 1982).[31] But, unlike the restriction at issue in *Queensgate*, which prevented certain liquor permit holders from advertising prices outside their business premises, the advertising ban at issue here is directed at an entirely separate industry—cable television—that has no

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[31] *New York State Liquor Authority* v. *Bellanca*, 452 U.S. 714 (1981), and *California* v. *LaRue*, 409 U.S. 109 (1972), both of which concerned state regulations governing lewd dancing and similar conduct in bars and cocktail lounges, are thus distinguishable. The regulations in *Bellanca* and *LaRue* were directed exclusively at liquor permit holders, and conflicted with no federal statutes or regulations.

relevant contractual relationship to the liquor industry and indeed no economic interest in liquor advertising.[32] Moreover—and critically for purposes of this controversy—the industry to which the ban is applied is fostered and encouraged under and, for these purposes, exclusively regulated by federal law. The Twenty-first Amendment was not intended to limit the power of Congress to delegate to a federal agency exclusive authority to regulate the communications industry.

Even if the Court is not willing to adopt at this time a categorical presumption in favor of the supremacy of valid federal regulations governing industries not directly involved in liquor distribution, it seems beyond doubt that the federal interests at stake in this controversy far outweigh any marginal benefit the State may reap in its efforts to dampen the demand for alcoholic beverages. The Commission's regulation of cable television is vital to achievement of a diverse and economically healthy national communications system. Oklahoma's ban on liquor advertising, as applied to the cable industry, would impede these objectives and effectively deny the benefits of cable television to many of the residents of the State. As discussed in Part I, *supra*, because of economic considerations and the Commission's "must carry" rules a cable broadcaster cannot simply delete all out-of-state broadcast signals from its service, nor can it block out wine commercials without losing its compulsory license under the Copyright Act and violating applicable Commission regulations. Therefore, in the understated prose of the court of appeals, the state advertising ban indeed places cable broadcasters in a "difficult position" (Pet. App. 23a)—directly between the

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[32] Cable broadcasters do not derive revenues from the advertisements contained in the signals they import. Thus, it makes no economic difference to a cable broadcaster whether, at any given time, an imported television program contains oven cleaner or wine commercials. See Pet. App. 40a; J.A. 29; II R. 44-45.

twin disasters of economic ruin and state criminal prosecution.

The detrimental impact on cable broadcasters of a decision in favor of the State, moreover, would not be limited to Oklahoma. A diminished national market for cable services necessarily decreases the resources available for national programming. Moreover, should other states adopt similar or conflicting liquor advertising restrictions, the cable broadcast copyright scheme envisioned by Congress would be progressively gutted; the resulting financial and practical dislocations could well render an "efficient, Nation wide" cable broadcasting system unattainable. 47 U.S.C. 151, 152(a).

The federal concerns that undergird the preemption of Oklahoma law in this case are thus "both familiar and substantial." *California Retail Liquor Dealers Ass'n*, 445 U.S. at 110. For almost fifty years, the Commission has been charged with fostering a nationwide system of communications, capable of reaching persons throughout the land. In so doing, the Commission has found it expedient to preclude state and local control over cable television operations, including their carriage of commercial advertisements. Oklahoma's undoubted "control over whether to permit importation or sale of liquor and how to structure the liquor distribution system" (*id.* at 110) simply does not justify the provision at issue.[33]

The Supremacy Clause of the Constitution, therefore, requires reversal of the decision below, notwithstanding the state's authority under the Twenty-first Amendment. "The relative importance to the State of its own law is not material when there is a conflict with a valid federal

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[33] Oklahoma could easily exempt cable transmission of out-of-state signals from its ban, just as it has exempted print media imported into the State. Pet. App. 5a n.1, 23a-24a. See *Dunagin* v. *City of Oxford*, No. 80-3762 (5th Cir. Oct. 31, 1983), slip op. 473-474 (Mississippi's ban on liquor advertising has been interpreted by the State as not requiring interruption or deletion of out-of-state wine commercials transmitted by cable television).

law, for the Framers of our Constitution provided that the federal law must prevail." *Free* v. *Bland*, 369 U.S. at 666. See also *Fidelity Federal Savings & Loan Ass'n*, 458 U.S. at 153 (standard preemption principles not inapplicable merely because an area of special importance to the state is involved).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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